Petition

81-715

No. _____

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

OSWALD M. BRADLEY,
CAROL L. BRADLEY, co-partners t/a
BRADLEY BROTHERS CLEANERS & LAUNDERERS,

Petitioners,

vs.

J. F. BATTE & SONS OF RICHMOND, INC.
and NED M. GROSSBERG t/a
MEDICAL SCIENCE ASSOCIATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fourth Circuit

Oswald M. Bradley
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Richmond, Virginia 23230
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QUESTIONS PRESENTED

The petitioners present the following questions for determination:

1. Whether the Bankruptcy Judge erred in overruling the motion of the counsel for the defendant to withdraw?

2. Whether the Bankruptcy Judge erred in granting respondents relief from the stay imposed by 11 U.S.C. §362(a)?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported and is set forth in the appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on the 4th day of April, 1981. Petitioners' timely Petition For Rehearing was denied by that Court on May 5, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

This case involves 11 U.S.C. §§303(b)(3), 361(1) and 362(a) and (d).

STATEMENT OF THE CASE

The petitioners are petitioners in bankruptcy pursuant to 11 U.S.C. §303(b)(3) for the purpose of reorganization, who conducted their business from a portion of real estate formerly owned by them and purchased by respondents at a foreclosure sale. The Judge of the United States Bankruptcy Court for the Eastern District of Virginia granted respondents relief from the automatic stay provisions of the Act, pursuant to 11 U.S.C.

§362(d), which decision was affirmed by the United States Court of Appeals for the Fourth Circuit.

The petitioners filed a petition in bankruptcy seeking reorganization under 11 U.S.C. Chapter 11 on November 27, 1979. The respondents filed a complaint under 11 U.S.C. §362(d) seeking relief from the stay imposed by 11 U.S.C. §362(a). A preliminary and final hearing were held on March 11, 1980. An Order and memorandum opinion were entered on March 27, 1980, in favor of the respondents. On April 4, 1980, the petitioners filed a Notice of Appeal to the United States District Court. The United States District Court affirmed the Bankruptcy Court by Order entered on August 26, 1980. The petitioners filed a Motion For Rehearing on September 5, 1980, which was denied by an Order entered on September 23, 1980. The petitioners filed a Notice of Appeal to the United States Court of Appeals, from the Order affirming the judgment of the Bankruptcy Court entered in this action on August 26, 1980, and the denial of a Motion For Rehearing entered on September 23, 1980.

By decision dated April 2, 1981, the Court of Appeals denied that appeal. Petitioners' subsequent Petition For Rehearing was denied by the Court of Appeals on May 5, 1981.

The respondents purchased the petitioners' interest in real estate known as 2920, 2924 and 2930 West Broad Street, Richmond, Virginia, at a foreclosure sale on July 26, 1978. The substitute trustee conveyed the aforementioned property to the respondents by deed on September 1, 1978. The petitioners continued to possess a portion of the property from which they conducted their cleaning and laundry business. After substantial litigation, the respondents obtained a judgment against petitioners in the amount of $20,500. Execution of the Order was suspended subject to the petitioners providing a bond of $20,500. The bond was posted and the case was appealed. The respondents obtained a writ of possession on November 14, 1979, and requested the petitioners to voluntarily vacate the premises. The petitioners refused to vacate the premises and filed a petition in bankruptcy under Chapter 11 seeking a

reorganization. The trustee has never filed an approved accounting and the liens on the property have never been released. Although the property had been advertised to be sold to the highest bidder, he refused the highest bid.

The respondents filed a complaint in the United States Bankruptcy Court on January 30, 1980, seeking relief from the stay which had been imposed by the filing of petitioners' petition in bankruptcy. The relief which the respondents sought was pursuant to 11 U.S.C. §362(d) and would be treated as an adversary proceeding. A summons and notice for a preliminary hearing was issued directing that an answer be filed by February 15, 1980, and that a hearing be held on February 25, 1980. Throughout the foregoing proceedings, the petitioners had been represented by Israel Steingold. Their counsel suffered an innless which apparently prevented him from filing the answer and which resulted in his death on February 22, 1980. It was in that context that Robert D. Shrader of Mr. Steingold's firm appeared on February 25, 1980, to seek a continuance on

behalf of the petitioners. The continuance was granted and the preliminary hearing and final hearing were set for March 11, 1980. Counsel appeared on March 11, 1980, and requested the court to allow him to withdraw stating that the petitioners were seeking other counsel and that an inadequate amount of time had been provided to prepare. The petitioners had insisted upon having a counsel of their own selection and with the untimely death of their former counsel such a request was not unreasonable. The motion to withdraw was overruled and the hearing was held which resulted in the granting of the relief that had been sought by the respondents.

The court's conclusion, affirmed by the Court of Appeals, that the petitioners made no offer and produced no evidence at any hearing that would effect adequate protection for the respondents left the petitioners without assurance that they could continue their business. The decision of the Bankruptcy Court would superficially allow the petitioners to reorganize while, at the same time, permitting the respondents

to oust them from their only place of business.

REASONS FOR GRANTING THE WRIT

I

The Bankruptcy Judge erred in overruling the motion of counsel to withdraw.

In Bacon v. Hart, 66 U.S. 38 (1861), the proposition was advanced by the court when an attorney died during the course of litigation that a contract of employment for legal services is personal in its nature and terminates upon the death of the attorney employed. It would seem that if Bacon were applied in the instant case that petitioners were without counsel when their attorney died on February 22, 1980. The subsequent appearance by counsel on February 25, 1980, was necessitated by the consideration on the part of this attorney that his firm had a duty to make an appearance and that a continuance would give the petitioners an opportunity, due to the circumstances, to select their own counsel. The court continued the hearing to March 11, 1980. The petitioners did not obtain another

attorney and on March 11, 1980, a motion to withdraw was made which the court overruled. In making the motion to withdraw, counsel stated that the petitioners were seeking other counsel and that an inadequate amount of time had been provided to prepare. A motion to withdraw was denied in Garner v. Pearson, 384 F. Supp. 591 (M.D. Florida 1974) when no mention was made of substitute counsel and no new attorney filed an appearance. Unlike Garner, counsel for the petitioners did represent to the court that petitioners were seeking other counsel and that representation alone should have been enough for the court to sustain the motion to withdraw while weighing the need to provide sufficient time to prepare and the desire of petitioners to obtain other counsel against the urgency to have the hearing.

II

The Bankruptcy Judge erred in granting respondents relief from the stay imposed by 11 U.S.C. §362(a).

The property where the petitioners conduct their business is absolutely essential to reorgani-

zation.

The decision of the Bankruptcy Court to lift the stay imposed against the respondents pursuant to 11 U.S.C. §362(a) left the petitioners without protection from remedies available to the respondents under state law. The decision of the court is somewhat paradoxical: the petitioners were left in reorganization, but without protection from the respondents who could oust the petitioners at any time. The relief which was granted by the court is tantamount to putting the petitioners out of business. In reaching this decision, the court looked at the three non-exclusive methods under 11 U.S.C. §361 by which the respondents might be adequately protected. The court then concluded that no evidence had been offered to satisfy either of these methods.

Although the denial by the Supreme Court of Virginia of petitioners' petition for appeal regarding the propriety of the foreclosure sale apparently resolves the ownership question in favor of the respondents, the petitioners are still in reorganization under Chapter 11 and they have only one place where they conduct their business.

In the case of In Re A.L.S., Inc., 3 BR 107, 6 BCD 4, 1 CBC 2d 516 (BC ED Pa. 1980), the court was confronted with a complaint to obtain relief from stay and determined that the success of the debtor's plan depended upon the debtor's possession of the premises even though the debtor had failed to pay rent. A.L.S. is distinguishable from the present case since there was a lease; however, the similarity is the same beyond that distinction. The court in A.L.S. looked at 11 U.S.C. §361(1) and ordered all rent and charges to be paid. It is petitioners' contention that the Bankruptcy Court could have ordered rent in this case, which would have provided adequate protection to the respondents, wince the continued possession of the premises was absolutely essential to the reorganization of the petitioners' business.

CONCLUSION

Petitioners respectfully submit that for the reasons herein stated that the decision of the United States Court of Appeals for the Fourth

Circuit and the Order of the Bankruptcy Court for the Eastern District of Virginia in this action be reversed and remanded and that the Court determine such findings as to be improper or, in the alternative, that petitioners be granted relief as prayed.

Respectfully submitted,

OSWALD M. BRADLEY,
CAROL L. BRADLEY, co-partners
t/a BRADLEY BROTHERS CLEANERS
& LAUNDERERS

Oswald M. Bradley

Carol L. Bradley

CERTIFICATE

I hereby certify that a true copy of the foregoing reprinted Petition was mailed this 24 day of August, 1981, to Oakley J. Graham, Jr., Esquire, 3122 W. Clay Street, Richmond, Virginia 23230.

Carol L. Bradley

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1981

OSWALD M. BRADLEY,
CAROL L. BRADLEY, co-partners t/a
BRADLEY BROTHERS CLEANERS & LAUNDERERS,

Petitioners,

vs.

J. F. BATTE & SONS OF RICHMOND, INC.
and NED M. GROSSBERG t/a
MEDICAL SCIENCE ASSOCIATES,

Respondents.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1732

Oswald M. Bradley and Carol L. Bradley, co-parterns t/a Bradley Brothers Cleaners and Launderers,

Appellants.

versus

J. F. Batte and Sons of Richmond, Inc., and Ned M. Grossberg, t/a Medical Science Associates,

Appellees.

O R D E R

Upon consideration of the appellants' pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Russell, Judge Widener, and Judge Hall.

F I L E D
May -5 1981
U. S. Court of Appeals
Fourth Circuit

For the Court,
/s/William K. Slate, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1732

Oswald M. Bradley and Carol L. Bradley, co-partners t/a Bradley Brothers Cleaners and Launderers,

Appellants,

v.

J. F. Batte and Sons of Richmond, Inc., and Ned M. Grossberg, t/a Medical Science Associates,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued: March 3, 1981 Decided: April 2, 1981

Before RUSSELL, WIDENER and HALL, Circuit Judges.

Robert D. Shrader, Jr. (Steingold, Shrader & Angelidis on brief) for Appellant; Oakley J. Graham, Jr. for Appellee.

PER CURIAM:

Bankrupts Oswald and Carol Bradley appeal from an order of the bankruptcy court which removed the stay imposed under 11 U.S.C. §362(a) and permitted the appellees to proceed with their state remedies to oust the Bradleys from certain business premises. In issuing its order, the court determined that the Bradleys could offer no security to protect the appellee's interests during the course of the bankruptcy proceedings. Upon reviewing the record and arguments of counsel, we find the bankruptcy court's ruling to be amply justified and, therefore, affirm.

The Bradleys owned a parcel of real estate situated in Richmond, Virginia, upon which they operated a cleaning and laundry business. They defaulted upon certain debts, and a deed of trust against this real estate was foreclosed. On July 26, 1978, a public auction was held at which the appellees were the successful bidders; they received a trustee's deed to the property on September 1, 1978.

The Bradleys continued to occupy the premises

and refused to leave. On September 31, 1978, the appellees instituted an unlawful detainer action in the General District Court of the City of Richmond. A verdict was entered in favor of the appellees, and the Bradleys appealed to the Circuit Court of the City of Richmond. In lieu of an appeal bond, the parties agreed that the Bradleys would pay $866 per month for the use of the premises. These rent payments were never made.

On January 26, 1979, during the pendency of the appeal to the Richmond Circuit Court, the Bradleys instituted in that court an equitable suit to set aside the trustee's sale under the deed of trust. On October 3, 1979, the court denied equitable relief, and on October 25, 1979, affirmed the lower court's decision in the unlawful detainer action. The court ordered the Bradleys to pay $20,500 to the appellees and to vacate the premises. However, this order was suspended to permit appeal to the Supreme Court of Virginia upon the condition that the Bradleys post a $50,000 bond. The bond was never posted and no payments were made.

On November 14, 1979, the appellees obtained a writ of possession and on November 16 a writ of execution. Again, the Bradleys refused to vacate. On November 27, 1979, the Bradleys filed a petition under Chapter 11 of the Bankruptcy Act and all efforts to oust the Bradleys were stayed pursuant to 11 U.S.C. §362(a). In the meantime, both state court decisions were appealed to the Virginia Supreme Court of Appeals; both decisions have since been affirmed.

On January 30, 1980, the appellees instituted an adversary proceeding to obtain relief from the stay pursuant to 11 U.S.C. §362(d). A summons and notice were issued by the court directing the Bradleys to file an answer by February 5 and to appear at a hearing scheduled for February 25. The Bradleys' attorney became ill and failed to file the answer; on February 22, he died. Another member of the deceased attorney's firm appeared at the February 25 hearing and requested a continuance so that the Bradleys could retain new counsel. Upon this motion, the hearing was continued until March 11. By that

date, the Bradleys still had not retained counsel. The deceased attorney's partner again appeared on the Bradleys' behalf and requested the court's permission to withdraw as counsel because the Bradleys were still seeking other counsel. This request was denied, and the case came on for hearing.

The Bradleys presented no evidence of their ability or desire to protect the appellee's interests in the property. After reviewing the history of litigation between the parties, the court concluded that the Bradleys had failed to offer such protection and had demonstrated by their past conduct an inability to provide adequate protection. Thereupon, the court ordered relief from the stay pursuant to 11 U.S.C. §362(d) and permitted the appellees to proceed with their appropriate state remedies. The district court affirmed the ruling on all points.

The Bradleys now contend that the subject real estate is their sole place of business and, therefore, is essential to their reorganization. Rather than granting relief from the stay, they

argue that the bankruptcy court should have first ordered them to pay rent, and then have lifted the stay only upon their failure to comply. This argument is unpersuasive.

The appellants have occupied these premises for some 30 months without compensating the appellees and without posting the security required by the state courts. Their past conduct and their failure to offer security before the bankruptcy court lead to the inevitable conclusion that the appellants are either unable or unwilling to protect the interests of the appellees. We see no reason why the bankruptcy court should have taken the obviously futile step of ordering the Bradleys to pay rent.

Additionally, counsel for the Bradleys argues that the bankruptcy court erred in refusing him permission to withdraw. The record does not support this contention and, therefore, we find no error.

Accordingly, we affirm the decision of the bankruptcy court in all respects. However, to

give the Bradleys time to move from the premises, our mandate will be stayed for 30 days from entry of judgment.

A F F I R M E D.